

The other answer put forward by the plaintiff to the defence of limitation is also in my opinion a good one. He argues that even if he was a labourer this is not a claim for wages to which Article 2 should apply but a claim for money deposited under an agreement that it shall be payable on demand and that under article 42 such a claim is not barred until 3 years from the date when the demand is made. Although in his defence the defendant denies that there was an agreement that the wages should accumulate he did not persist in that contention and his books clearly show that that was the arrangement; and I find as a fact that when the plaintiff was promoted from coolie to tindal the parties entered into the arrangement so common among Indians both here and in their own country namely that the salary or wages should be allowed to accumulate and remain with the employer under an agreement that they should be payable on demand and that the plaintiff should draw against what was due to him whenever he required money. That was precisely the position in the case of *Subramanian Chettiar v. Kaderesan Chettiar*, (1916) 32 I.C. 965 where it was held that such money was "money deposited" within the meaning of Article 60 of the Indian Limitation Act (corresponding to our article 42) and that money in the hands of a trader who is not a banker will be "a deposit" in circumstances such as would make it money of a customer when the deposit was a banker. That was the unanimous view of the Madras Court of Appeal and although it is not binding upon this Court it affords a valuable guide and I have no hesitation in coming to a similar conclusion in the present case.

The substantial effect of the arrangement that the plaintiff's wages should remain with the defendant and be allowed to accumulate was that the defendant consented to act as the plaintiff's banker. At the end of each month the wages for that month must be regarded as having been paid and forthwith deposited with the defendant for safe custody. The plaintiff was credited or must be taken to have been credited with the \$25/- each month. He was entitled to and did in fact draw money from time to time up to the amount of his credit balance and such drawings were debited against his account. Finally on demand he was entitled to have a balance struck and to be paid what was found to be due to him exactly as would have been the case if he had deposited with a banker. I am satisfied that article 42 applies and that the defence of limitation fails.

There will be judgment for the plaintiff for \$748.45.

I make an order allowing costs to include profit costs.

Judgment accordingly.

Solicitor for the plaintiff—K. S. Lim.

Solicitors for the Defendants—

Logan, Ross & Samuel.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

September, 21, 1934.

K. A. R. RAMANATHAN CHETTY .. Plaintiff
vs.

TAN CHENG HOO & ANOR.....Defendants.

[PENANG SUIT No. 471 of 1932]

Practice—Judgment—Assignment of—Omission of Assignee to give Notice to debtor—Application for leave to execute—Non-joinder of Assignor as a party—Irregularity of Order—Civil Procedure Code Ss. 591 (1) (a), 1339.

The assignee of a judgment debt who has not given notice to the debtor of the assignment cannot sue or issue execution on the judgment debt unless he makes the assignor a party to the proceedings.

If the assignor is not made a party to the application for leave to issue execution and if an *ex parte* order is made thereon, such order is defective and the defect cannot be cured under section 1339 of the Civil Procedure Code which applies only to cases in which there is a non-compliance with any provision in the Code or rule of practice.

Adjourned Summons.

This was a Summons taken out by the 1st defendant applying for the release of his immoveable property seized under an order of Court dated the 1st September, 1933. The application was supported by an affidavit of the applicant from which it appears that the plaintiff assigned to one Chee Tiang Guan (hereinafter referred to as "the assignee") the benefit of the judgment recovered in this action against both defendants, that the assignee did not give to the defendants notice of the assignment, that, without joining the assignor as a party, he applied to Court for leave to issue execution against the defendants, that an order was made granting the necessary leave and that in pursuance of the last mentioned order the immoveable property of the 1st defendant was seized. The applicant contended that the property should be released on the ground that no notice of the assignment was given to him and his co-defendant. The absence of notice was not disputed.

Ong Huck Lim for 1st defendant (applicant)

Regester for plaintiff's assignee—

(respondent)

Cur. Ad. Vult.

WHITLEY, J.—This was a summons taken out by the first defendant under section 619 (5) of the Civil Procedure Code applying for the release of certain property of the first defendant which had been seized under an Order dated the 1st September, 1933 and made under section 591 (1) (a) of the Code.

Judgment in the suit was recovered against both defendants. The plaintiff assigned the benefit of the Judgment to one Chee Tiang Guan the husband of the second defendant. The first defendant alleges that this was not a *bona fide* transaction and further that he has certain claims outstanding against the second defendant who is his sister but it was agreed that the merits of these allegations should not be gone into. They were merely mentioned by counsel to explain why the first defendant seeks to take advantage of any irregularity which there may have been in the seizure in order to gain time by obtaining an order for release. The ground upon which he claims to be entitled to release is that he was not given notice of the assignment. The assignee admits that no notice was given.

Such an assignment of a judgment debt is an equitable assignment of a legal chose in action. Had express notice been given to the assignee the assignment would have become a legal assignment under the provisions of section 4 (6) of the Civil Law Ordinance (which corresponds to section 136 (1) of the Law of Property Act 1925 replacing section 25(6) of the Judicature Act 1873), and the legal right to the judgment debt together with all legal remedies including the right to issue execution in his own name would have been transferred to the assignee; but as no notice was given the assignment is no more than an equitable assignment and the assignee's title will not be effective as against the judgment debtor until such notice is given. *Dearle v. Hall, Loveridge and Cooper*, (1828) 3 Russ. 1. Not having given notice the assignee cannot sue or issue execution on the judgment debt unless he makes the assignor a party to the proceedings. *Durham Brothers v. Robertson*, (1898) 1 Q.B. at page 769. The assignor was not a party to the application for leave to issue execution in the present case and it is accordingly clear that the assignee was not entitled to execute. It would follow then that the judgment debtor, first defendant, is entitled to have the seizure released unless the failure to join the assignor can be remedied even at this late stage.

Section 133 of the Civil Procedure Code provides that no cause or matter shall be defeated by reason of the non-joinder of parties and the assignee now seeks to regularize his seizure by applying for leave to join the assignor as a party to his summons for leave to execute.

It would seem from the observations of Lord Macnaghten in *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, (1905) A.C. 454 at page 462 that an action would not now be dismissed merely because the assignor was not made a party in the first instance. In that case Dunlops who were in the position of debtors disclaimed any wish to have the assignors a party and in fact they were not added.

In the case of *Bowden's Patents Syndicate Ltd. v. Smith*, (1904) 2 Ch. 86 the plaintiffs were allowed to amend by adding the assignors as plaintiffs on terms as to costs and Warrington, J., at page 91 laid down the rule as follows:—

"Now what is the general rule of the Court with regard to an action brought by an equitable owner of property? The common case with which we are most familiar is an action relating to some debt in respect of which the provisions of the Judicature Act, which allow an assignee to bring an action in his own name without joining the assignor, have not been complied with. In that case, unless I am much mistaken, the well-accepted practice of this Court is that the legal owner of the property in question must be a party to the action, either as plaintiff or defendant. He is the proper person to bring the action. If he does not bring the action, then the course which the plaintiff adopts is that of proving that fact and making him a defendant. But the practice of the Court, as I understand it, is that the legal owner of the property must be before the Court somehow, in order that he may be bound. Applying that to the present case and holding, as I do, that the agreement of December, 1897, is not a legal but an equitable assignment of the patent, the conclusion I come to is that it is necessary in order to enable these parties to maintain this action to have the legal owner of the patent before the Court.

"Therefore it would be necessary, in my opinion, to add the executors of Mr. Bowden as plaintiffs in the action. For that purpose it is obvious that the matter must stand over in order that they may be added.

"I have been asked to allow the amendment, and I propose to do so."

In *Hudson v. Fernyhough*, 1889, 61 L.T. 722 the plaintiff was not allowed to amend by adding the assignor as a party as such amendment would have changed the substantial rights of the parties but Lord Coleridge in his judgment made it clear that such an amendment would properly be allowed in a case where "both parties were left in precisely the same position after it as they

would have been in if no amendment had been rendered necessary by the mistake or slip that had been made." The rule in such a case is that however negligent may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side and there is no injustice if the other side can be compensated in costs. *Per* Lord Esher, M.R. in *Clarapede v. Commercial Union Association*, 32 W.R. 262.

Applying this rule I should be disposed to allow the proposed amendment in the present case inasmuch as it appears to be one in which the other side could be properly compensated in costs but I am faced with two difficulties. The first one is that the summons which it is sought to amend was finally disposed of by the order dated 1st September, 1933, which was duly taken out and upon which the assignee issued execution. In the case of *Durham Brothers v. Robertson*, (1898) 1 Q.B. at page 774 in which the subject matter was also an equitable assignment which did not come within section 25 sub-section 6 of the Judicature Act 1873 (section 4 (6) of the Civil Law Ordinance) Chitty, L.J. concluded his judgment with these words "The trial has taken place and it is not possible now to make any amendment by adding parties or otherwise." On the other hand in *Brandt's* case to which I have already referred and which was an appeal to the House of Lords, Lord Halsbury (at page 462) was apparently prepared to add the assignors as parties if necessary even at that late stage and Lord James in his judgment observed "The defect in the parties to the suit can be remedied." On careful perusal of the two cases I am disposed to think that Chitty L.J. did not intend his words to be of general application and meant no more than that it was not possible to add parties after trial in that particular case because of the practical difficulties (which he had previously set out) in the way of finally determining the rights of the parties in the absence of those who should have been but were not parties.

The decisions in England on Order 16 Rule 11 from which our section 133 Civil Procedure Code is taken are somewhat conflicting. In the case of *Attorney General v. Corporation of Birmingham*, 15 Ch.D. 423 Jessel, M.R., reversing Bacon, Y.C. held that it was never intended to allow an amendment of the pleadings to introduce fresh parties after final judgment but in that case it was sought substantially to amend the pleadings as well as to add new defendants. It was not a case of the mere formal addition of a plaintiff such as is applied for in the present case.

In *Keith v. Butcher*, L.R. 25 Ch. D. 750 leave was given to amend by adding puisne mortgagees

as defendants in a foreclosure action in which judgment had been pronounced but not drawn up and entered; and in *Re Dracup*, (1892) W.N. 43 when it was discovered after judgment had been passed and entered in a beneficiary's action for administration that an executor who had not proved at first had subsequently come in and proved, an application by the plaintiff for leave to amend by adding this executor as a defendant was in substance allowed though the order was made in a different form.

It is clear that the Court has a wide discretion in the matter and were it not for the final difficulty which I shall next consider, I should hold on the authority of the dicta of Lords Halsbury and James in *Brandt's* case that even at this stage leave might be given to add the assignor as a plaintiff on condition that the assignee should pay the first defendant's costs.

The final difficulty is this; that the summons which the assignee now seeks to amend was an *ex parte* application upon which he obtained an order to which he was as it now transpires not entitled. This fact differentiates the case from all the others to which I have referred. The assignee applying under section 591 (1) of the Civil Procedure Code for leave to execute obtained such leave as being the party entitled to execution. In fact not having given notice he was not legally entitled and the order made was consequently an irregular order. "In such a case" to quote the words of Fry, L.J. in *Anlaby v. Praetorius*, 20 Q.B.D. at page 768 "the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiae* and there are good grounds why that should be so because the entry of judgment is a serious matter leading to the issue of execution and possibly to an action of trespass." It is true that the present application is for an order for release under section 619 (3) of the Civil Procedure Code but as was pointed out by Hyndman Jones, C.J. in *Letchmanan Chetty v. Serah and others*, Singapore Suit No. 926 of 1904 the registration of the order of release under this sub-section operates as a cancellation of the registration of the order of seizure so that in effect this is an application to set aside the order of seizure. This is not a case which comes within section 1339 of the Civil Procedure Code which gives the Court a discretion "to set aside amend or otherwise deal with" for that section only applies to cases of non-compliance with any provision of the Code or other rule of practice. The irregular order was made independently of any such provision or rule; the assignee had no right to obtain any order at all.

But as was pointed out in *Anlaby v. Praetorius* although the Court is bound to set

aside an irregular judgment *ex debito justitiae* it has always exercised a discretion as to costs and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action. In the circumstances of the present case I feel that I should exercise my discretion in that way and take the course which was adopted by Bayley, J. in *Cash v. Wells*, 1 B. & A. 375. There will be an order for release in terms of the summons and if the first defendant consents not to bring any action for trespass or the wrongful seizure or the like, he will have his costs of the summons paid by the assignee. If he does not consent there will be no order as to costs.

Order refused.

Solicitors for the 1st defendant (Applicant)

Hogan & Ivens.

Solicitor for plaintiff's assignee—

Ong Huck Lim.

[CIVIL DISTRICT COURT JURISDICTION]

COLMAN, D.J.

[SUPREME COURT APPELLATE CIVIL JURISDICTION]

SHAW, C.J., and BARRETT-LENNARD, J.

March 5, 1925

CHOP CHYE HIN CHONG

Plaintiffs (Respondents)

vs.

NG YEOK SENG.....Defendant (Appellant)

[S'PORE DISTRICT COURT SUMMONS No. 337 of 1924]

[SINGAPORE CIVIL APPEAL No. 10 of 1924]

Damages for wrongful distress—Proof of malice—Civil Procedure Code, S. 724.

Where a writ of distress is regularly issued in pursuance of section 724 of the Civil Procedure Code, that is, where the Court or a Judge having upon the evidence considered the landlord entitled to recover arrears of rent due to him by seizure of the tenant's property and has ordered a writ of distress to be issued,

Held, by the Court of Appeal, reversing the decision of Colman, D.J., that an action by the tenant for damages for wrongful distress does not lie in the absence of proof of malice on the part of the landlord.

This was an action brought in the District Court in which the plaintiff claimed damages against the defendant for the wrongful seizure of the plaintiff's goods under a writ of distress which had been set aside. The distress had been set aside on the ground that it was in respect of 2 months' rent whereas only 1 month's rent was in arrear and the plaintiff had tendered the amount actually due.

The defendant counterclaimed for the rent then due to him.

The action was heard before Colman, D.J.,

Cur. Ad. Vult.

COLMAN, D. J.—I held that the name in which Plaintiff sued was immaterial the Chop and he being admittedly the same thing.

Distress was set aside by Clayton, Assistant District Judge, and his decision was unreviewed. As commonly happens, an action for damages followed in the Court of higher Jurisdiction and notes of the Assistant District Judge which did not show in what respect the distress was held wrongful were put in evidence to assist in assessment. It was uncertain whether the Assistant District Judge had found as a fact that the tenant had never agreed to pay rent in advance and had tendered the one month's rent due; or held as a matter of law that distraint for two months rent was wrongful where one month was due for rent accrued and one month's rent due as rent agreed to be paid in advance (*London and Westminster Loan Company v. London and North Western Railway*, (1893) 2 Q.B. 49; 62 L.J., Q.B. 376) on the principle often urged that an agreement to pay rent in advance is only a contractual obligation to deposit money as security before the rent actually accrues due at the end of the month, distress only lying for rent actually accrued. In these actions, there is in practice therefore something like a retrial in the District Court on the same facts. I assumed, however, that the distraint was wrongful on some judicially established ground.

Damages, therefore, had to be assessed on the basis that at any rate not more than one month's rent was due, whether this had been tendered or not. I inclined to the view that tender had not been proved, a question relevant as to proof of malice. The whole stock-in-trade was seized, stopping the business the causing great damage to a small tradesman. I think this was clearly excessive, and therefore actionable without proof of malice (*Halsbury*, Volume XI, Article 398).

I held that the interpleader rule that damages are not recoverable after a judicial interposition did not concern the law of distress, and ought not to be applied thereto, the interposition of the Court in such cases being only of a regulative and ministerial nature in fact mere *ex parte* procedure which decided no issues. I agreed with Mr. Samy that there was no malice of the kind which in certain cases gives an action of tort for setting in motion a judicial officer or causing him to proceed. The decision in "*Surinam v. Letchmee*," so regularly quoted in this Court during distraint proceedings, and so extraordinary, was referred to by the defendant but he relied mainly on *Pridgeon v. Mellor and others*, (28 L.T.R. page 261) which I held inapplicable.

As regards rent I allowed \$100/-; perhaps, too much, as the defendant by his own wrongful act prevented the premises from being used for the purpose for which he let them; but this side of the